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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1570

WILLIAM CRAIG MILLIS and R. STEVE ACERS,
Appellants,

vs.

HIGH DRIVE WATER DISTRICT, a public corporation; BOARD OF COUNTY COMMISSIONERS OF LARIMER COUNTY, COLORADO; ROBERT E. MOORE, and RICHARD M. GREEN,
Appellees.

MOTION TO AFFIRM

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INTRODUCTION

For the reasons hereinafter set forth, Appellees submit that the decision of the District Court herein should be affirmed by the Court. The result reached herein by the three-judge panel was clearly indicated by previous decisions of this Court. The questions on which the decision of the cause depends are thus so unsubstantial as not to need any further argument and briefing before this Court. The District Court's judgment should therefore be affirmed pursuant to the provisions of Rule 16 (1) (c) of the Rules of the Supreme Court.

The Jurisdictional Statement filed by Appellants herein characterizes this case as a novel one "involving the disenfranchisement of a large percentage of property owners in a taxing district" which "has never been before the Court." The matter is novel only because it involves an assertion by property owners who are residents of one state of a constitutional right to vote in local matters in another state. This assertion of such a "right" is, indeed, novel because it is completely inconsistent with prior holdings of this Court.

QUESTION PRESENTED

The sole question before the Court herein is the narrow issue decided by the three-judge Court—Do those Colorado Statutes establishing qualifications for electors in water district elections [C.R.S. 1973, §32-1-101 (1976 Cum. Supp.) and 32-1-802 (3)] violate the Fourteenth Amendment to the United States Constitution by providing that such electors must be qualified to vote in general elections in Colorado?[1] The effect of this requirement is to exclude Colorado property owners not residents of Colorado from the group of qualified electors.

STATEMENT OF THE CASE

For purposes of this Motion, the background of this case is adequately presented in the lower court's Memorandum

[1] Other issues were presented by Appellants to the District Court including alleged violations of due process and the privileges and immunities clauses of the Fourteenth Amendment. These additional issues were noted in Appellants' Notice of Appeal. Appellants' Jurisdictional Statement, Appendix C However, Appellants now limit themselves to the equal protection question decided by the District Court and apparently do not appeal any other questions herein. Appellants' Jurisdictional Statement, Pages 6-7.

Opinion and Order at Appendix A, Pages 19-23 of Appellants' Jurisdictional Statement. To repeat that background material here would be unnecessarily repetitious.

The three-judge District Court held, of course, that the relevant statutory provisions were not violative of the equal protection of the laws guaranteed by the Fourteenth Amendment.

ARGUMENT

I. Previous decisions of this Court have clearly established the power of the states to restrict the franchise to bona fide state residents.

As noted by the District Court, there is no constitutional right to vote in state elections. *Pope v. Williams*, 193 U.S. 621 (1904); *Snowden v. Hughes*, 321 U.S. 1 (1944). The sole issue herein is thus whether the distinction between Colorado resident property owners and property owners who reside in other states is permissible.

Appellants have implied that the decisions of this Court in durational residency and other voter qualification cases are not applicable here because "this appeal does not involve the right to vote in general elections," Appellants' Jurisdictional Statement, Page 13. This is an understandable attempt to distinguish cases such as *Pope v. Williams*, supra, *Carrington v. Rash*, 380 U.S. 89 (1965) and *Kollar v. City of Tucson*, 319 F. Supp. 482 (D. Ariz., 1970), aff'd mem. 402 U.S. 967 (1971), which recite the well-established interest of the states in excluding non-residents from their elections. As discussed more fully below, those decisions are certainly not helpful to Appellants' position herein. However, any such attempt to distinguish the water district elections as "special purpose" rather than "general" is not helpful to Appellants' case anyway. In a "special purpose" district election, the

rational basis test clearly applies and the state needs only a minimal interest to justify excluding a class from the franchise. *Salyer Land Company v. Tulare Lake Basin Water Storage District,* 410 U.S. 719 (1973); and *Associated Enterprises, Inc. v. Toltec Watershed Improvement District,* 410 U.S. 743 (1973) (per curiam).[2]

The right of the states to restrict the franchise to state residents is a fundamental exercise of the powers reserved to the states under the Tenth Amendment to the United States Constitution. As the limitations of this Court's voting rights decisions make clear, the Fourteenth Amendment qualified the Tenth Amendment only to the extent of prohibiting invidious discrimination between state residents. In this case, the power reserved to the state by the Tenth Amendment, is the right to maintain certain essential controls over their own political processes. At the very least, the Tenth Amendment assures to the states a right of meaningful existence as political entities, which right would be violated by federally mandated intrusion of non-residents into state political processes.

Pope v. Williams, supra, involved state laws which allowed voter registration only after a declaration of intent to become a state resident. In holding that this requirement did not violate the Equal Protection Clause of the Fourteenth Amendment, the Court stated:

> "...the privilege to vote in a state is within the jurisdiction of the state itself, to be exercised as the state may direct, and upon such terms as to it may seem proper..." 193 U.S. at 632.

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[2] It should be noted that the District Court did find the High Drive Water District (sometimes hereinafter referred to as the "District") to be "a quasi-municipal corporation, with municipal powers for accomplishing the limited municipal purpose of providing water," citing C.R.S. 1973 §31-12-103 (10) (1975 Cum. Supp.). Appellants' Jurisdictional Statement, Appendix A, Page 20.

The approval of durational residency requirements in *Pope* has, of course, been overruled by more recent decisions of this Court, including *Dunn v. Blumstein,* 405 U.S. 350 (1972). Nevertheless, those decisions in which the Supreme Court has considered restrictions on the franchise over the last twenty (20) years have, virtually without exception, been couched in such terms as to leave no doubt as to the power of a state to limit the franchise to its residents. This has been true even in decisions striking down state restrictions on the franchise.

In *Lassiter v. Northampton County Board of Elections,* 360 U.S. 45 (1959), the Court affirmed the power of a state to impose literacy tests on prospective voters and in its opinion stated:

> "There is wide scope for exercise of its [the state's] jurisdiction. *Residence requirements,* age, previous criminal record...are obvious examples indicating factors which a state may take into consideration in determining the qualifications of voters." 360 U.S. at 51, (emphasis added).

In *Carrington v. Rash,* supra, the Court held unconstitutional a Texas statute which created an unrebuttable presumption that members of Armed Forces living in Texas were not state residents. The Court nevertheless felt constrained to state that:

> "Texas has unquestioned power to impose reasonable residence restrictions on the availability of the ballot. [Citing *Pope, Lassiter.*]... We stress—and this is a theme to be reiterated—that Texas has the right to require that all military personnel enrolled to vote be bona fide residents of the community. But if they are in fact residents...they, as all other qualified residents have a

right to an equal opportunity for political representation." 380 U.S. at 91.

In *Evans v. Cornman*, 398 U.S. 419 (1970), the Court held that residents of a federal enclave in Maryland were Maryland residents and could not be denied the franchise for that reason. Again, however, the Court was careful to note that:

> "Maryland may, of course, require that 'all applicants for the vote actually fulfill the requirements of bona fide residence'." (Citing *Carrington*.) 398 U.S. at 421.

In *Kollar v. City of Tucson*, supra, this Court affirmed the finding of a three-judge district court that the state had a compelling interest in a requirement which limited the franchise in municipal revenue bond elections to municipal residents.

As previously noted, in *Dunn v. Blumstein*, supra, this Court struck down *durational* residency requirements. The Court again qualified its opinion in saying:

> "We emphasize again the difference between bona fide residence requirements and durational residence requirements. We have in the past noted approvingly that the *states have the power to require that voters be bona fide residents* of the relevant political subdivision. [Citing *Evans, Kramer, Carrington,* and *Pope.*]...An appropriately defined and uniformly applied requirement of bona fide residence may be necessary *to preserve the basic conception of a political community,* and therefore could withstand close constitutional scrutiny. [Citing *Pope, inter alia.*]...[A] state does have an interest in limiting the franchise to bona fide members of the community." 405 U.S. at 343-4, 354; (emphasis added).

In a similar fashion, the decisions of this Court in those cases more directly concerned with voting rights in local

elections have been so phrased as to leave no doubt as to the continuing power of the states to impose bona fide residency requirements, *Kramer v. Union Free School District,* 395 U.S. 621 (1969); *City of Phoenix v. Kolodziejski,* 399 U.S. 204 (1970); *Cipriano v. City of Houma,* 395 U.S. 701 (1969). In each of these decisions the Court framed the issue before it as involving the denial of the franchise to those *otherwise qualified* by age, *residence,* and citizenship. Likewise, in *Hill v. Stone,* 421 U.S. 289, (1975), the Court stated:

> "In *Kramer v. Union Free School District No. 15, supra,* we held that in an election of general interest, restrictions on the franchise *other than residence,* age, and citizenship, must promote a compelling state interest in order to survive constitutional attack...The basic principle expressed in these cases [*Kramer, Cipriano,* and *Phoenix*] is that as long as the election in question is not one of special interest, any classification restricting the franchise on grounds *other than residence,* age, and citizenship cannot stand unless the district or states can demonstrate that the classification serves a compelling state interest." 421 U.S. at 295, (emphasis added).

The lengths to which this Court has gone to preserve the Tenth Amendment powers of the states with regard to restrictions on the franchise are, thus, clearly evident throughout these recent voting rights decisions. The challenge by Appellants to the Colorado Statutes in question here flies in the face of the language of those decisions and basic tenets of federalism as well. As Mr. Justice Black, in announcing the judgments of the Court in *Oregon v. Mitchell,* 400 U.S. 112 at 125, (1970), states:

> "No function is more essential to the separate and independent existence of the States and their governments than the power to determine within the limits of the Constitution the qualifications of their own voters for state, county, and municipal offices. [Citing *Pope.*]...It is obvious that the whole Constitution

reserves to the States the power to set voter qualifications in state and local elections, except to the limited extent that the people through constitutional amendments have specifically narrowed the powers of the States... [T]he Equal Protection Clause of the Fourteenth Amendment was never intended to destroy the States' power to govern themselves...".

II. There is a rational basis for restriction of the franchise in water district elections to state residents.

The District Court correctly determined that the "rational relationship" standard of equal protection scrutiny was applicable in this case. As that Court's opinion stated, "[t]he classification of property owners by state residence is neither invidious or suspect." Appellants' Jurisdictional Statement, Appendix A at Page 24.[3]

Again, in the language of the District Court,

"The Colorado General Assembly used a combination of interests to establish the requirements for qualification as an elector of a water district. All such electors must have sufficient residence in the State of Colorado to be able to participate in general elections in the state.

[3] However, it should also be noted that the long line of decisions discussed above approving bona fide residence requirements certainly would lead to the conclusion that such requirements would satisfy the compelling state interest test as well. That this is so clearly indicated by the Court's affirmance of the three-judge Court in *Kollar*, supra, where the lower court at 319 F. Supp. 485 stated as follows:

"The necessity of a boundary restriction in municipal elections, rather than some other less definitive qualification, the generally greater stake of residents in local elections, and the necessity to define the electorate in advance of election date and properly to administer the elections are sufficiently compelling interests, in this instance, for Arizona's limitation on an absolute right to vote. To allow the municipal franchise to all persons with a pecuniary interest would not permit of a manageable standard or adequately define a cohesive interested group of electors."

Additionally, each elector must have a more particular or localized interest in the service area of the district. That requirement can be met either by residence in that area for 32 days or by the ownership of real or personal property within the district..." Appellants' Jurisdictional Statement, Appendix A at Page 23.

In other words, what the state has done is to enfranchise two classes, district residents, and a second, property owners who are state residents but not residents of the district. As set forth in the discussion above, the State clearly has the constitutional power to define its electorate in terms of bona fide residence. The state has then expanded that residence requirement to include an additional class of *state-resident* property owners. Such an expansion has been approved by previous ruling of this Court. In *Spahos v. Mayor and Councilmen of Town of Savannah Beach, Tybee Island, Georgia*, 207 F. Supp. 688 (S.D. Ga. 1962), *aff'd per curiam*, 371 U.S. 206 (1962), this Court affirmed the decision of the District Court upholding a statute permitting non-resident property owners to vote in municipal elections provided they were residents of the county in which the municipality was located. The attack on the statute in that case was by citizens of the municipality who alleged their vote had been diluted. Thus, as stated by the lower court, the narrow issue becomes simply whether there is a rational relationship in "the classification of landowners according to Colorado residency," i.e., whether there is a valid interest in limiting the expansion of the class of property owners based on state residence. Appellants' Jurisdictional Statement, Appendix A at Page 25.

Several possible rational bases for the subject statutes are evident. As mentioned by the District Court, they include "convenience in identifying voters, protection against fraud, the inextricable relationship between state and local financing and voter awareness of local issues." The

interest most persuasive to the lower court was that of a common interest of state residents "in the matter of urban development and the protection of the environment" and "the allocation of a vital natural resource which affects all in the state." Appellants' Jurisdictional Statement, Appendix A at Page 25.

Appellants, at Pages 14 and 15 of their Jurisdictional Statement, make much of the fact that some out-of-state property owners might actually live closer to the District than some Colorado property owners not residing in the District and, therefore, would presumably be as interested in urban development and resource allocation. However, as this Court noted in *Dunn v. Blumstein,* supra, at Page 1012, "classifications are always imprecise." All we are concerned with here is whether there is any rational basis for the classification. As the District Court found, the particular interest of Colorado residents as a class in urban development and the allocation of a vital resource, water, is not shared by the residents of other states as a class. "It is therefore, a rational relationship to a legitimate state interest which is sufficient to support the statutory discrimination which excludes the plaintiffs from voting." Appellants' Jurisdictional Statement, Appendix A at Page 25.

What Appellants argue in this matter, in essence, is that because they are in some way affected by the District's activities, they have some constitutional right to participate in District elections, regardless of their state of residence. However, as Justice Rehnquist stated in *Salyer Land Company v. Tulare Lake Basin Water Storage District,* 410 U.S. 719 (1973), there is no such constitutional requirement:

> "No doubt residents within the district may be affected by its activities. But this argument proves too much. Since assessments imposed by the district become a cost

> of doing business for those who farm within it, and that cost must ultimately be passed along to the consumers of the produce, food shoppers in faraway metropolitan areas are to some extent 'affected' by the activities of the district. Constitutional adjudication cannot rest on any such 'house that Jack built' foundation, however." 410 U.S. at 731-32.

CONCLUSION

Appellees submit, for the foregoing reasons, that the questions upon which a decision in this matter depend are not so substantial as to require full argument and briefing before this Court. Rather, the decision of the three-judge District Court was a well-reasoned analysis of this cause which is entirely consistent with and foreshadowed by numerous decisions of this Court. Appellees therefore ask that the decision of the District Court be affirmed pursuant to the provisions of Rule 16 (1) (c) of the Rules of the Supreme Court.

Respectfully submitted,

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APPENDIX A

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution

Amendment X

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Amendment XIV, Section 1

"All persons born or naturalized in the United States, are subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Colorado Revised Statutes, 1973

§ 32-1-101 (1)

"(a) 'Elector' of a district means a person who, at the designated time or event, is qualified to vote in general elections in this state and:

(I) Who has been a resident of the district or the area to be included in the district for not less than thirty-two days; or

(II) Who, or whose spouse, owns taxable real or personal property within the district or the area to be included in the district, whether said person resides within the district or not."

"(b) 'Taxpaying elector' of a district means an elector of a district who, or whose spouse, owns taxable real or personal property within the district or the area to be included in the district, whether said person resides within the district or not."

§ 32-1-802 (3)

"(a) An 'elector' of a district, within the meaning of this part 8, is a person who, at the designated time or event, is qualified to vote in general elections in this state and:

(I) Who has been a resident of the district or the area to be included in the district for not less than thirty-two days; or

(II) Who or whose spouse owns taxable real personal property within the district or the area to be included in the district, whether said person resides within the district or not.

"(b) A person who is obligated to pay general taxes under a contract to purchase real property within the district shall be considered an owner within the meaning of this subsection (3).